No. 19-35427

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK E. GABLE,

Petitioner-Appellee,

v.

MAX WILLIAMS,

Respondent-Appellant.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had jurisdiction over this federal habeas corpus case under 28 U.S.C. § 2254.

B. Finality of Judgment and Appellate Court Jurisdiction

The district court entered final judgment granting habeas corpus relief on April 18, 2019. (E.R. 4). This court has jurisdiction under 28 U.S.C. § 1291.

C. Date of Entry of Judgment and Timeliness of Notice of Appeal

Final judgment was entered on April 18, 2019. (E.R. 4). Appellant (the superintendent) filed his notice of appeal on May 15, 2019, within 30 days of the entry of judgment. (E.R. 1). Accordingly, the notice of appeal is timely under Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

Petitioner procedurally defaulted claims that: (1) he suffered a due-process violation during his trial for murder when the state trial court excluded, as hearsay, another person's recanted confession to the murder; and (2) he suffered a violation of his right to effective assistance of counsel when his trial counsel failed to raise a due-process objection to the exclusion of that recanted confession.

Are those procedural defaults excusable under either *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995), or *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012)? And if so, is petitioner entitled to relief on either claim?

STATEMENT OF THE CASE

A. Nature of the Case

In this habeas corpus case, petitioner Frank Gable seeks relief from his conviction and sentence for aggravated murder. (*See* E.R. 102, 107–13).

B. Course of Proceedings and Disposition Below

Petitioner initiated this proceeding by filing a *pro se* petition for habeas corpus relief. (C.R. 1). A magistrate judge appointed counsel, (C.R. 4), who filed an amended habeas petition, (C.R. 61; E.R. 100). The parties, as well as amicus Oregon Innocence Project, then briefed the issues raised in the amended petition. (*See* C.R. 74, 101, 114, 125, 135, 149, 164).

Based on the briefs and the amended petition, and upon the parties' consent to jurisdiction by a magistrate judge, (C.R. 166–67), the district court issued an opinion and order that, as relevant here, granted habeas relief on two related claims relating to evidence excluded at trial—one claim alleging that the trial court's ruling violated petitioner's federal constitutional rights, and another claim alleging ineffective assistance of trial Counsel for Appellant failing to argue that the ruling violated petitioner's federal constitutional rights. (E.R. 98–99). The district court denied relief on all other claims. (E.R. 99).

In connection with its grant of habeas relief, the district court ordered the superintendent to release petitioner unless the state "elects to retry him" within 90 days of the order. (E.R. 99). The same day, the district court entered judgment consistent with that order. (E.R. 4). But at the superintendent's request, the district court later stayed the judgment effecting that order. (C.R. 189).

The superintendent now appeals the district court's order and judgment granting petitioner habeas relief.

STATEMENT OF FACTS

The superintendent draws the following facts, wherever possible, from the district court's factual summary.

A. The Murder

In January 1989, the director of the Oregon Department of Corrections was stabbed to death near the Dome Building on the grounds of the Oregon State Hospital. (E.R. 7). The victim was last seen alive shortly before 7 P.M., on his way home from his office at the Dome Building. (E.R. 10). No more than thirty minutes later, two of his colleagues found the victim's car in the parking lot with its driver's-side door open, were unable to find or contact the victim, and reported their concerns to security. (E.R. 10–11). Shortly after midnight, a security guard found the victim's body outside an entrance to the

Dome Building, at the top of a trail of blood showing that the victim had climbed the stairs to that entrance, attempted to open the locked door by breaking a pane of glass, and died on the porch. (E.R. 11). The cause of death was a stab wound to his heart. (E.R. 11).

B. The Trial and Other State Court Proceedings

In June 1991, a jury convicted petitioner for the murder. (E.R. 7). The state's evidence in support of that conviction involved primarily eyewitness testimony, petitioner's statements to police, testimony from people to whom petitioner had made admissions of culpability for the murder, and circumstantial evidence.

As far as eyewitness testimony, the state put on four witnesses: Wayne Hunsaker testified that, at around the time the murder must have occurred, he saw two men facing each other in the parking lot of the Dome Building and that one of the men ran away at full speed after Hunsaker heard one of the men make a sound like he had just been hurt. (E.R. 12–13). Hunsaker did not identify either of the men. (*Id.*).

Jodie Swearingen told the grand jury that she had gone with petitioner to the Dome Building on the day of the murder and agreed to serve as a lookout for him, while petitioner went "to get snitch papers." (E.R. 15–16). She further acknowledged in her grand jury testimony that she saw petitioner "get into a

struggle with this big tall man near that white car" before fleeing the scene in a car driven by Cappie Harden. (E.R. 16). In her trial testimony, Swearingen recanted, asserting that none of those earlier statements—which she acknowledged were contained in her grand jury testimony—was true. (E.R. 16).[1]

Cappie Harden (sometimes called "Shorty," (*see* E.R. 543, 723)) testified that he came to the Dome Building parking lot because Swearingen had called to ask him for a ride, and that while there, he saw petitioner stab a man who interrupted him in the course of a car robbery. (E.R. 14–15).

Earl Childers testified that near the time of the murder, he saw petitioner driving away from an area near the murder scene and that, a day or two later, petitioner said to "forget [he] ever saw him there." (E.R. 16–17).

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[1] The substance of Swearingen's grand jury testimony, at least inasmuch as she explicitly acknowledged it on cross-examination, was available for the jury to consider as substantive evidence. Petitioner did not object to this line of questioning or seek to limit it to impeachment purposes, and the grand jury testimony was not hearsay because it was inconsistent with her trial testimony and was given under oath subject to the penalty of perjury at the grand jury proceedings. *See* Or. Evid. Code R. 801(4)(a)(A) ("A statement is not hearsay if * * * [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * [i]nconsistent with the testimony of the witness and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition[.]").

As for evidence of petitioner's statements to police, the state introduced a series of statements in which petitioner generally suggested that he was unsurprised to be under investigation for the murder and that he expected to be convicted for it. (E.R. 27–28, 30). In other statements, he admitted to police that he may have jokingly told his wife that he committed the murder, and that he might have made similarly incriminating statements to others. (E.R. 28, 33). Further, petitioner suggested to police that he was the only living person who knew what happened to the victim, and he also made statements suggesting that he knew what certain witnesses were going to say, without any explanation of how he would know that unless he were guilty. (E.R. 31, 34–37). Finally, petitioner admitted that he might have been driving by the murder scene on the night of the murder. (E.R. 37).

The rest of the state's evidence came from petitioner's friends and family, some of whom offered circumstantial evidence tending to suggest that petitioner committed the murder, and some of whom testified that petitioner had told them expressly that he was responsible for the murder. (*See* E.R. 17–26).

In his defense, petitioner sought to introduce, over the state's hearsay objection, evidence that a man named John Crouse had confessed to the murder. (E.R. 37). As explained in more detail below, Crouse gave police five different accounts of the crime to which he was confessing, all of which were starkly at

odds with each other, and inconsistent with material details of the actual crime. (*See* E.R. 42–49). Petitioner contended that the out-of-court confessions were admissible under the hearsay exception for statements against penal interest, as set forth in Oregon Evidence Code Rule 804(3)(c), which applies when the declarant is "unavailable" to testify. (E.R. 74). Outside the jury's presence, the trial court allowed defense counsel to call Crouse to the witness stand to determine if he would refuse to testify. (E.R. 74). Counsel first asked Crouse whether he committed the murder, and Crouse said no before invoking his Fifth Amendment privilege in response to any further questions on the matter. (E.R. 74–75, 760). Based on that testimony, the trial court held that Crouse's out-of-court confessions did not qualify for admission under the rule for statements against penal interest. Specifically, the trial court held that—given Crouse's in-court testimony denying responsibility for the murder—Crouse was not "unavailable" to testify on that subject, and one of the conditions for use of the statement-against-interest hearsay exception was therefore unsatisfied. (E.R. 75).

The jury ultimately convicted petitioner, after which he was sentenced to life imprisonment without the possibility of parole. (E.R. 40). He unsuccessfully pursued a direct appeal and state post-conviction relief. (E.R. 40–42).

C. The Federal Habeas Proceeding

In this proceeding, petitioner sought habeas relief on a number of claims. As relevant here, his seventh claim alleged a denial of federal constitutional rights when the trial court excluded evidence of third-party guilt in the form of Crouse's out-of-court confessions, and his fifteenth claim, subparagraph (E), alleged ineffective assistance of trial counsel in connection with arguing for admission of that evidence. (E.R. 109, 111). The district court allowed relief on those two claims, notwithstanding petitioner's procedural default in state court. (E.R. 7, 9, 98–99).

The district court excused the procedural default primarily by concluding that petitioner had established actual innocence as contemplated in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995). (*See* E.R. 73). In reaching that conclusion, the district court relied on two classes of evidence. First, it relied on a series of recantations from people—including Swearingen, Harden, and Childers, among others—who had offered incriminating statements to police or testimony at trial and had at some point later recanted those statements, alleging that they had made the statements in response to police coercion. (*See* E.R. 49–59 (summarizing that evidence); E.R. 63–71). Amplifying the effect of those recantations was an affidavit from an expert in polygraph techniques, who asserted that the police investigation in this case employed irregular and

coercive polygraph and interrogation tactics. (E.R. 58–59). Second, the district court relied on Crouse's recanted confession. (*See* E.R. 42–49 (summarizing that evidence); E.R. 71–73).

Having excused the procedural default, the district court proceeded to assess petitioner's claims on the merits, ruling that they entitled petitioner to habeas relief. (E.R. 73–87). The district court viewed petitioner's two claims—a claim that the trial court violated due-process principles when excluding Crouse's recanted confession and a claim that trial counsel provided ineffective assistance by not raising a due-process objection to that exclusion—as intertwined and analyzed them as such. (E.R. 73–74). The district court concluded that Crouse's recanted confession was critical to petitioner's defense, that it bore sufficient assurances of trustworthiness, and that its exclusion under state evidentiary rules therefore violated due-process principles as articulated in *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973). (E.R. 78–83). And the district court further concluded, based on its application of *Chambers* to Crouse's recanted confession, both that petitioner's ineffective-assistance-of-counsel claim was meritorious and that petitioner's post-conviction counsel was so ineffective in raising it that petitioner could rely on *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012), to excuse his procedural default of that claim. (E.R. 85–87).

SUMMARY OF ARGUMENT

The district court erred in holding that petitioner could satisfy *Schlup*'s actual innocence standard to excuse his procedural default of his due-process claim of trial court error. His new evidence—witness recantations and a recanted third-party confession—is not the kind of evidence that *Schlup* contemplated as necessary to establishing actual innocence, such as new eyewitness testimony or scientific analysis that would undermine some physical evidence of guilt. Regardless, that new evidence does not establish what *Schlup* would require: that no reasonable juror would convict petitioner considering the evidence as a whole. Here, even if the testimony of the recanting witnesses were completely discounted, the remaining evidence is sufficient to convince a reasonable juror of petitioner's guilt. Moreover, the statements of Swearingen, Harden, and Childers implicating Gable are untainted by the alleged police coercion and would further convince a reasonable juror of petitioner's guilt. And Crouse's recanted confession is too unreliable to change that analysis. For those reasons, this court should not reach the merits of petitioner's due-process claim.

Regardless, petitioner's due-process claim fails on the merits because the trial court permissibly excluded a third-party confession under a reasonable and

non-arbitrary state evidentiary rule that favors in-court testimony over out-of-court statements, and because the third-party confession here was not reliable.

This court should reject petitioner's procedurally defaulted ineffective-assistance claim for similar reasons. Precisely because the due-process claim fails on the merits, trial counsel could reasonably have declined to raise it at trial, and post-conviction counsel could have reasonably declined to assert a claim against trial counsel on that basis.

STANDARD OF REVIEW

"A district court's decision to grant or to deny a petition for habeas corpus is reviewed de novo." *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 437 (9th Cir. 2007) (internal quotation marks omitted).

"The standard of review for a *Schlup* claim" of actual innocence "is not entirely settled in this circuit," with review to be conducted either de novo or for abuse of discretion. *Stewart v. Cate*, 757 F.3d 929, 938 (9th Cir. 2014); *see also Jones v. Taylor*, 763 F.3d 1242, 1245 (9th Cir. 2014). But as this court has observed, "the Supreme Court has applied a form of review in *Schlup* cases that more approximates de novo review." *Stewart*, 757 F.3d at 938; *see also Larsen v. Soto*, 742 F.3d 1083, 1092 (9th Cir. 2013) (observing that "the question whether [petitioner] has satisfied the *Schlup* standard is a legal question that we review de novo"). So too have other circuits. *See Stewart*, 757 F.3d at 939

(citing cases from the Second, Third, Fourth, Seventh, and Eighth Circuits). For the reasons well explained in the dissent to *Stewart*, 757 F.3d at 947–51 (Berzon, J., dissenting), the correct standard of review is de novo. Among other reasons for de novo review, the *Stewart* dissent explained that the *Schlup* standard is "fluid" and "vague" enough to require "substantial appellate oversight." *Stewart*, 757 F.3d at 950 (Berzon, J., dissenting).[2]

ARGUMENT

The district court granted habeas relief on two distinct claims: (1) that the trial court violated petitioner's due-process rights when excluding Crouse's recanted confession; and (2) that his trial counsel provided ineffective

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[2] Regardless, even if this court were to review the district court's *Schlup* analysis for abuse of discretion, it should conclude that the district court abused its discretion by failing to consider, as set forth below, *all* of the evidence, including the evidence untainted by recantations or allegations of irregular interrogation practices. To be sure, the district court made passing reference to "all of the evidence, both old and new," (*see, e.g.*, E.R. 63), but its application of *Schlup* rests entirely on evidence not presented at trial—specifically, recantations, allegations of irregular interrogations, and a third-party confession. (E.R. 63–73). Because *Schlup* requires framing that newly presented evidence within the context of all the other evidence, as the state does below, the district court's failure to do that reflects an abuse of discretion. *See Paradis v. Arave*, 130 F.3d 385, 396–99 (9th Cir. 1997) (stating that "[a]s the district court applied an erroneous standard for the showing of actual innocence here, it abused its discretion").

assistance by not raising a due-process objection to the trial court's ruling on that evidence. (E.R. 98).

On his first claim (alleging trial-court error), petitioner concedes a procedural default resulting from his failure to pursue that claim in the state court proceedings. (C.R. 74 at 28, 167 n.71)). The district court agreed that the claim was procedurally defaulted. (E.R. 7, 9; C.R. 74 at 28, 167 n.71)). Thus, analysis of that claim must proceed in two steps. First, this court must determine whether petitioner has established a basis for proceeding on his procedurally defaulted claim under *Schlup*. Next, and only if petitioner has established that basis, this court must assess the merits of his claim of error. As explained in sections A and B below, petitioner's claim fails at both those steps.

And as to petitioner's second claim (alleging ineffective assistance of trial counsel), petitioner also concedes procedural default, and the district court accepted that concession. (E.R. 7, 9; C.R. 74 at 28, 167 n.71). Petitioner argued, and the trial court agreed, that he could proceed on his procedurally defaulted claim because he had established cause and prejudice to excuse that default under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). (E.R. 83–87). But as explained below in section C, the district court was incorrect to conclude that petitioner's claim against trial counsel is the sort of exceptional claim that *Martinez* contemplated as eligible for relief from procedural default.

A. Petitioner did not establish "actual innocence" that would allow a federal court to review his procedurally defaulted claim.

Under *Schlup*, actual innocence, "if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar or expiration of the statute of limitations." *Stewart v. Cate*, 757 F.3d 929, 937 (9th Cir. 2014) (internal quotation marks, ellipses, and brackets omitted). Here, petitioner's evidence falls short of the standard that *Schlup* set for claims of actual innocence, and the district court erred in concluding otherwise. Before explaining why and how petitioner's evidence falls short, the superintendent addresses the preliminary question of how a court should apply *Schlup*'s standard.

1. "Actual innocence" requires concluding that *no* reasonable juror would vote to convict defendant on a record containing all the evidence, old and new.

The Supreme Court has cautioned that "tenable actual-innocence gateway pleas are rare," requiring a petitioner to adduce "'*new* evidence'" that is sufficient to establish that "'no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S. Ct. 1924 (2013) (emphasis added; quoting *Schlup*, 513 U.S. at 329); *see also House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met). In this context, "new evidence" means evidence "that was not presented at trial."

Sistrunk v. Armenakis, 292 F.3d 669, 673 n.4 (9th Cir. 2002) (internal quotation marks omitted).

In assessing whether a petitioner has met *Schlup*'s "no juror" standard, a court must make a "probabilistic determination about what reasonable, properly instructed jurors would do" on a record that contained "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id*.; *see also Stewart*, 757 F.3d at 941 (similar).

Importantly, a court's function in applying that standard "is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. Put differently, the *Schlup* "inquiry does not turn on discrete findings regarding disputed points of fact," but instead requires a "holistic judgment about all the evidence and its likely effect on reasonable jurors." *House*, 547 U.S. at 539–40 (internal quotation marks and citations omitted). Because that inquiry requires no factual findings and turns on consideration of *all* the evidence, it leaves no room for the deference typically owed to a "trial court's assessment of evidence presented to it in the first instance." *House*, 547 U.S. at 539–40.

Properly applied, that analysis will "permit[] review only in the

'extraordinary' case." *Stewart*, 757 F.3d at 938 (quoting *Schlup*, 513 U.S. at 324–27); *see also Schlup*, 513 U.S. at 324–27 (emphasizing that "claims of actual innocence are rarely successful").

Given how demanding that standard is, only "dramatic new evidence of innocence" is sufficient to meet it. *Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013). Indeed, "*Schlup* pointed out three types of evidence that would pass the threshold of reliability: exculpatory scientific evidence, trustworthy eyewitness accounts and critical physical evidence." *Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011) (Kozinski, C.J., concurring). By "enumerating the categories of evidence that could prove innocence, the Supreme Court made clear that less reliable kinds of evidence cannot support an actual innocence claim." *Id*. at 945–46. Put simply, *Schlup* does not allow "a trial do-over," because any other approach would "eviscerate the doctrine of abuse of the writ." *Id*. at 946.

That view of *Schlup* is consistent with the Supreme Court's view of that case. In *House*, the Court explained that *Schlup* "requires new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," even if the ultimate inquiry under *Schlup* "is not limited to such evidence." 547 U.S. at 537 (internal quotation marks omitted). In other words,

before *Schlup* may even be invoked, a petitioner must adduce "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."

An example of sufficiently "dramatic new evidence" of that sort can be found in the only case in which the Supreme Court has concluded that the *Schlup* standard was satisfied. *See House*, 547 U.S. at 554–55. In *House*, the petitioner produced DNA evidence establishing that semen found on a murder victim—and which the state's expert witness at trial had claimed could be connected to the petitioner by blood typing—came from the victim's husband and not from the petitioner. 547 U.S. at 529–30, 540–41. Further, the petitioner offered expert testimony to establish that, although the victim's blood was found in minute quantities on the petitioner's clothing, the blood was too degraded to have come from a live or recently murdered body and must have instead been inadvertently transferred during evidence handling. *Id*. 541–43. Finally, other evidence in the case established that the victim's husband had a history of violence towards his wife. *Id*. at 548. *House* demonstrates that *Schlup* requires a petitioner to come forward with new evidence, and that "new evidence must convincingly undermine the State's case." *Larsen*, 742 F.3d at 1096.

2. Petitioner has not established "actual innocence" under the *Schlup* standard.

Considering all the available evidence adduced at trial and on habeas review, petitioner has not shown that no reasonable juror would vote to convict him. Assessing that question requires categorizing petitioner's new evidence of actual innocence into two general categories. In the first category are a series of recantations from trial witnesses, taken together with allegations that those witnesses had been subjected to irregular or coercive interrogation tactics. (*See* E.R. 49–59 (summarizing that evidence)). In the second category is Crouse's recanted confession. (*See* E.R. 42–49 (summarizing that evidence)).

Petitioner's actual-innocence claim fails, initially, because his new evidence is not the kind of new evidence contemplated in *Schlup*—he offers no exculpatory scientific evidence, no trustworthy eyewitness accounts of the murder, and no critical physical evidence. At bottom, the new evidence in this case simply seeks to relitigate the credibility determinations that petitioner's original jury necessarily resolved. *See Jones v. Taylor*, 763 F.3d 1242, 1248–1251 (9th Cir. 2014) (explaining why "recantation testimony is properly viewed with great suspicion" and is unlikely to meet the actual-innocence standard (internal quotation marks and brackets omitted)). But that kind of approach is not what *Schlup* contemplated.

Regardless, even if petitioner's new evidence is of the sort that can

satisfy *Schlup*, his offer of recantations would, at most, cause a reasonable juror to ignore any testimony—exculpatory or inculpatory—from the newly recanting witnesses. But the remaining evidence, after ignoring the testimony of newly recanting witnesses, would be sufficient to cause at least some reasonable jurors to convict. Moreover, despite their recantations, not all reasonable jurors would completely discount the testimony of Swearingen, Harden, and Childers, each of whom implicated petitioner in some way before any alleged police coercion. And petitioner's other new evidence—including Crouse's confession—is not enough to establish that no reasonable juror would convict petitioner after review of all evidence old and new. Ultimately, the evidence in this case does not approach the evidence that presented close questions of actual innocence in other cases.

a. Even if recantations would cause reasonable jurors to completely discredit several witnesses, petitioner's own statements and behavior preclude a determination that no reasonable juror would convict.

Petitioner's first category of new evidence—the recantations—are helpful to him only insofar as they discredit the newly recanting witnesses' testimony. Even assuming that all reasonable jurors would be persuaded by the new recantations, those recantations are not, themselves, new evidence of innocence. At most, they provide reason for a juror to discard all statements from those witnesses for lack of credibility.

The initial question in this case, then, is whether the remaining evidence—old and new, but ignoring any testimony from recanting witnesses—would likely cause at least one reasonable juror to convict petitioner. Because it would, petitioner's claim of actual innocence fails.

The most important aspect of the remaining evidence is that petitioner repeatedly told others that he had committed the charged murder. Specifically, petitioner admitted to police that he told his wife that he had killed the victim, although he characterized that conversation as "joking around." (E.R. 28, 137). Indeed, petitioner's wife corroborated, during police interviews, that—although petitioner had "never said to [her] that he killed Francke"—petitioner had indicated to her that he was involved in the murder. (E.R. 172–73). She told police that petitioner had "said that he knew what really happened" to the victim and, later the same evening, told his wife that she "didn't have any idea of all the things he'd been involved in" and that he needed to leave town. (E.R. 172, 178).

More recently, petitioner's wife explained that, although she stood by her statement that petitioner had "never said to [her] that he killed Francke," he did make statements suggesting his involvement. (E.R. 128). Further, petitioner's wife recently asserted that, three to four months after the murder, petitioner broke her arm but then apologized and told her that she "did not understand the

pressure he was under." (E.R. 129). Petitioner then started to cry and said "I stuck the guy"; when his wife asked, "What guy," he responded, "The guy at the hospital." (E.R. 129).

Petitioner confessed to others as well. When interviewed by police, Kris Warilla, whom petitioner identified to police as one of his drug-dealing acquaintances, (*see* E.R. 32), recounted petitioner's admission to having "stabbed a guy in a parking lot" while "breaking in the guy's car." (E.R. 933; *see also* E.R. 32, 931–32).[3] And petitioner's statements to police tend to corroborate that evidence. Petitioner told police that, in talking to his friends about the victim's murder, petitioner "might" have made statements that could be understood as claiming responsibility for the murder. (E.R. 33). Specifically, petitioner acknowledged that he had talked "to maybe two or three people"—his wife, Penny Farrow, and Kris Warilla—about the murder and that, although he had not told them that he did it, he "might have made some stupid statements" or "some funky statement that may have been perceived wrong."

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[3] Warilla did not testify at trial, but he also does not appear to have recanted his statements incriminating petitioner; certainly, petitioner offers no affidavit from Warilla among the formal recantations he has adduced in this proceeding. (*See* E.R. 49–57 (listing and summarizing petitioner's recantation affidavits)).

(E.R. 327).

Because the evidence establishes that petitioner had in fact repeatedly told his wife and friends that he was responsible for the murder, the question in this case reduces to a more concrete question than the abstract question of petitioner's guilt or innocence: Were petitioner's repeated confessions rooted in truth, or were they merely jokes or boasts? On that question, the other evidence more strongly points to the conclusion that his confessions were truthful.

The most important evidence on that question is that petitioner's behavior when questioned by police about the murder implied guilt. During police interviews, petitioner made statements implicitly admitting that he had been running away from the scene of the murder near the time of the murder. During one interview, police worked through a list of people, asking petitioner whether any one of them could have seen petitioner commit the crime. (E.R. 34). When police asked about Jodie Swearingen, petitioner broke the eye contact that he had maintained when asked about other people, and then he interrupted the continued questioning about other people to interject: "That Jodie gal, the bitch is saying she saw me run from the scene, isn't she?" (E.R. 34). And the next day, petitioner pressed for more information about eyewitnesses, saying: "I know it's that Jodie gal, isn't it? She is saying she saw me running from the

scene, isn't she?" (E.R. 34). In fact, that is precisely what Swearingen had told police and ultimately testified to before a grand jury—that petitioner had brought her to the murder scene to act as a lookout, and that the last time she saw petitioner that night he was running away from the murder scene after struggling with a tall man near a car. (E.R. 16).

By anticipating—without prompting—what Swearingen said, petitioner implicitly admitted that he went to the murder scene with Swearingen and then ran away. In the same vein, petitioner also admitted that Swearingen and Harden, who both claimed to have witnessed petitioner commit the murder, (*see* E.R. 13–16), may have seen him driving near the murder scene at the time of the murder: on the day of his arraignment, petitioner told a detective that he "might have been driving by that night and Jodie [Swearingen] and Shorty [Harden] saw me." (E.R. 37).

Petitioner made similarly incriminating statements regarding another witness as well. After petitioner was arrested and shown a list of more than 150 grand-jury witnesses, police told petitioner that one of their witnesses could place petitioner at the scene of the crime, driving away via a particular route. (E.R. 36, 448; *see also* E.R. 1385–88 (indictment)). In response, petitioner said, "Oh [Childers] told you that, didn't he?" (E.R. 36, 448). In fact, Childers *did* tell police that he had seen petitioner driving away from the murder scene

near the time of the murder. (E.R. 17). Like petitioner's statements regarding Swearingen, petitioner's statements implicitly corroborating Childers's statements further establishes his guilt.

Further, petitioner's other statements indicated a consciousness of guilt. Petitioner gave varying alibis for the night of the murder—sometimes indicating that he was certain where he was and then stating that he was unsure after the police indicated that his alibi might not check out. For example, during a November interview with police, petitioner stated that he was "sure" and "positive" he was with Kris Warilla on the night of the murder. (E.R. 845–47). He gave specific information about where they had gone, indicating that he went to a convenience store and bought "two candy bars and two sodas and that should be on the receipt if they have them for that day." (E.R. 847). Later in that interview, police told petitioner that Warilla had told police that petitioner had stabbed the victim. (E.R. 358, 886). When the police next revisited petitioner's alibi and attempted to confirm that he was "sure" that he was at Warilla's house, petitioner responded, "No, I'm not sure. I never have said I'm sure. I said I'm pretty positive that that may be where I was but I'm not sure." (E.R. 890).

The context of petitioner's statements—that he was initially certain he was with Warilla, but became uncertain after police told him that Warilla had

implicated him in the murder—support a reasonable inference that petitioner's initial account of his whereabouts was a lie rather than a mistake. And the inference that petitioner lied about his whereabouts on the night of the murder suggests not just a consciousness of guilt as a general matter—it suggests a consciousness of guilt as to the specific murder under investigation. *Contrast Larsen v. Soto*, 742 F.3d 1083, 1098 (9th Cir. 2013) ("Even if Larsen's use of a pseudonym suggests consciousness of guilt in some general sense, it cannot independently support a finding of guilt beyond a reasonable doubt for the specific crime of which Larsen was convicted.").

Finally, various other statements to police further reflect that consciousness of guilt. For example, at one point, when asked directly whether he killed the victim, petitioner did not deny it or even remain silent. Rather, he answered: "maybe so, maybe not." (E.R. 37). And when an officer responded by asking if petitioner intended to "take this to the grave," petitioner responded, "You bet I am." (E.R. 37). On another occasion, petitioner claimed that he and God were the only ones with knowledge of who killed the victim. (E.R. 31). That statement suggests that, aside from the victim, petitioner was the only person present at the murder.

Taken together, the foregoing evidence supports the conclusion that petitioner's confessions to his friends were rooted in truth, and no comparable

evidence supports a contrary conclusion that he was merely joking, boasting, or misunderstood in those confessions.

To be sure, petitioner claimed that he was joking when he told his wife that he had committed the murder, (E.R. 28), but his wife's description of those statements painted a different picture. After telling his wife that he "knew what really happened to Michael Francke," petitioner "was real agitated" and "saying that he didn't know what to do," that he "had to get out of town," and that his wife "didn't have any idea of all the things he'd been involved in." (E.R. 177–78). And when talking to police about those statements, petitioner's wife recalled that petitioner often seemed nervous or agitated in connection with any discussion of the murder. (E.R. 174, 178).

Nor does the evidence support concluding that petitioner was merely boasting. Admittedly, petitioner suggested to police that he might have believed that "people in the joint would think [he] was a big guy" if he were responsible for the murder. (E.R. 28). And at least some of his behavior during his interrogation (such as his agitated behavior and concern that he would be convicted) could be just as easily explained by worry over the consequences of ill-considered boasts as by consciousness of guilt. But a person concerned about being wrongfully convicted would be unlikely to tell police that "maybe" he committed the crime and that he would take the information to his grave.

(*See* E.R. 37). Nor would a concerned person behave as petitioner sometimes did during other interrogations, such as when he displayed a "big toothy grin." (*See* E.R. 34). Further, a concern about boasts would not explain petitioner's knowledge of Swearingen's and Childers's observations, or his dishonesty about his whereabouts at the time of the murder.

Finally, the evidence does not suggest that petitioner merely made innocent statements that "may have been perceived wrong," as he suggested when he admitted that he might have confessed to his friends. (*See* E.R. 327). For example, Warilla told police that petitioner explicitly confessed to stabbing someone "twice," in the chest and arm, in a parking lot after struggling with him. (E.R. 931–33).

b. The incriminating statements of Swearingen, Harden, and Childers—which preceded any alleged police overreaching—were more credible than their later recantations.

Petitioner cannot show that all reasonable jurors would view the foregoing evidence—none of which is undercut by the recantations that the district court relied on to grant relief—as insufficient to prove his guilt. Nor can he show that all reasonable jurors would discredit the incriminating testimony of Swearingen, Harden, and Childers in light of their recantations. Although those three witnesses alleged that police pressure and aggressive polygraphing led them to falsely implicate petitioner, (E.R. 236–44, 312–13),

each of those witnesses implicated Gable *before* that alleged pressure would have occurred.

In late October 1989, Swearingen made various statements to employees at a youth correctional facility where she was living at the time, including that petitioner had killed the victim, and that she "was nearby, possibly in a car." (E.R. 730–31; *see also* E.R. 733–36, 748). Those statements were made before she was subjected to allegedly coercive polygraphs by police, when she had no apparent reason to lie. (*See* E.R. 190–93 (Swearingen's first police polygraph in November 1989)). Indeed, in her police interviews before making those statements, Swearingen had invoked her right to counsel, and the police had honored her invocation, rebutting any suggestion of coercion at that time. (E.R. 159). For that reason, the report of her first polygraph examination shows that her attorney was present during the test. (E.R. 191).

In those circumstances, petitioner cannot establish that all reasonable jurors would have discredited Swearingen's incriminating statements in light of the recantations that petitioner now offers. Indeed, the jury in petitioner's trial did just the opposite when it convicted petitioner even after hearing Swearingen adamantly insist that she had lied under oath during the grand jury proceedings. (*See, e.g.*, E.R. 750).

Harden also implicated Gable before he was polygraphed and allegedly

pressured to change his story. In January 1990—after being advised of his rights and signing a card acknowledging those rights—Harden told police that Swearingen had told Harden "that she had seen Frank Gable kill someone and that she was scared" and that "she had witnessed someone being stabbed, that John [Bender] and Frank [Gable] had done it on the State Hospital grounds." (E.R. 151–52 (reporting Harden's statements made on January 18, 1990)). Although Harden did not admit that he had himself witnessed the murder until after a failed polygraph, he had already implicated Gable before that point. (*See* E.R. 153–54 (showing a shift, between the afternoon and evening of January 20, 1990, in Harden's statements about his involvement in the murder); E.R. 188–89 (report of a failed polygraph administered on Harden at approximately 7 p.m. on January 20, 1990)).

Similarly, in November 1989—during an interview to which his lawyer had agreed—Childers told police that he had seen petitioner near the murder scene and that petitioner had confessed to him. (E.R. 145–50). He was not polygraphed until the next month, at which point he was determined to be truthful. (E.R. 185–87). Petitioner has in this case offered an affidavit in which Childers alleged that police pressured him to "tell them what they wanted to hear," and in which Childers expressed doubt about his trial testimony implicating petitioner. (E.R. 312–13). But by the time of the habeas corpus

proceeding, Childers had submitted a more recent affidavit stating that his initial trial testimony was truthful and that he "was pressed by police during interviews, but no more so than during any other interview [he] had ever been subjected to." (E.R. 123–25). He explained that his earlier recantation to petitioner's investigators was made after he had suffered a seizure and memory loss, when an investigator "wrote the affidavit in her own hand, read it back to [him], and asked [him] to sign it" and told him "everyone else was doing it." (E.R. 124 ¶¶ 3–4). His memory has since improved, and he does not view his earlier affidavit as accurate. (E.R. 124 ¶¶ 3–4). In short, Childers now maintains that his statements were *not* the result of police coercion.

Even if a reasonable juror might credit some of the claims of police coercion regarding some witnesses, no reliable evidence suggests that any police coercion affected the statements of Swearingen, Harden, and Childers described above. Moreover, even if a reasonable juror might doubt some of their statements or find them unreliable in some respects, their statements implicating petitioner tend to show that petitioner's confessions were the product of his guilt and not something else. That is particularly true given that, as described above, petitioner's own statements corroborate parts of their testimony.

And by corroborating the statements and testimony of Swearingen,

Harden, and Childers, petitioner's own statements to police provide reason to doubt any later recantations by those witnesses. Indeed, the record on habeas review contains still further reason to discount petitioner's newly offered recantations from those witnesses. For example, Harden first recanted his trial testimony in June 2005, approximately 14 years after the trial, in an interview with the *Portland Tribune*. (E.R. 121). The *Portland Tribune* reported that prior to Harden's recantation, Harden was paid $1,000—facilitated by a man who ran a website "devoted to proving [petitioner's] innocence" —at a time when Harden was unemployed. (E.R. 121; *see also* E.R. 115–16). The $1000 appears to have been influential. A month earlier, prior to receiving the $1000 payment, Harden refused to speak with *The Oregonian* newspaper about the murder. (E.R. 116). Childers' recantation is no more reliable; as explained above, Childers has since recanted the recantation on which petitioner relies, insisting that his testimony at the criminal trial was true. (E.R. 123–25).

In sum, the statements of Swearingen, Harden, and Childers further support petitioner's guilt, and they refute the conclusion that no reasonable juror would vote to convict petitioner.

c. Petitioner's allegations of police misconduct do not undermine the evidence supporting his conviction.

Notwithstanding the foregoing evidence of guilt, the district court relied substantially on allegations of police misconduct when ruling for petitioner.

(E.R. 64–69). But potential police misconduct does not necessarily undermine petitioner's conviction.

As set forth above, the strongest evidence of petitioner's guilt is his own admission that he had told friends that he was responsible for the murder, taken together with his incriminating behavior during police interrogations. None of that evidence could have been the product of the police misconduct alleged in the affidavits that petitioner presents. Nor does police misconduct undercut incriminating testimony from Swearingen, Harden, and Childers, to the extent that their testimony is consistent with what they told police before being subjected to any allegedly coercive police conduct and is corroborated by petitioner's statements during interrogation.

For that reason alone, petitioner cannot establish that every reasonable juror would conclude that the foregoing evidence of guilt is undercut by allegations of police misconduct. And for at least two reasons, *other* recanting witnesses cannot change that conclusion by alleging police misconduct that they suffered.

First, those other recanting witnesses' incriminating statements amounted to little more than circumstantial evidence of guilt or corroboration of

petitioner's admission that he had been telling his friends that he had committed the murder.[4] Undermining that evidence through allegations of police misconduct does not significantly undermine the evidence of petitioner's guilt set forth above.

Second and more importantly, police misconduct and petitioner's guilt are not mutually exclusive in this case, on this record. Even if police acted improperly when obtaining witness statements during their investigation, that fact does not answer the key question presented by the whole record in this habeas case—again, when petitioner confessed the crime to his friends, did he do so because he was guilty or because he was joking or sought to improve his social standing among criminals?

For those reasons, the district court was mistaken to rely on allegations of

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[4] For example, John Kevin Walker testified at trial that petitioner confessed to him in private the day after the murder, but later recanted by asserting that he had "lied to satisfy police and to save his own butt." (E.R. 52 (internal quotation marks and brackets omitted)). Daniel Walsh testified at trial that petitioner twice confessed to the murder, but later recanted by asserting that he told the police what they wanted to hear because of "aggressive police questioning" and polygraph tactics. (E.R. 53–54). Petitioner has also offered affidavits from three individuals—Michael Keerins, Randy Studer, and Theresa Ross—who never testified at trial but claimed to have lied when implicating petitioner in their statements to police. (E.R. 49–58). Of those three, Studer is the only one to allege police misconduct as an explanation for why they purportedly lied in their earlier statements. (*See* E.R. 49–58).

misconduct by and recantations from witnesses other than Swearingen, Harden, and Childers.

d. Not all reasonable jurors would find Crouse's recanted confession credible enough to undermine the other evidence of guilt.

In determining that petitioner had met the *Schlup* standard, the district court also relied on Crouse's recanted "confession." But because that confession is unreliable, it would not likely change the result in this case.

Crouse's confession is unreliable primarily because he changed and recanted it several times—over the course of nine months from February 1989 to November 1989, Crouse offered at least five different stories recounting his involvement or non-involvement in the murder. Petitioner chooses one of those varying stories as reliable enough to satisfy *Schlup*, but petitioner's preferred version is not even Crouse's first or last story—rather, Crouse told different stories both before and after petitioner's preferred version.

In his first statement to police—which he made after extensive media coverage of the murder—Crouse claimed that he had killed his sister, but he did not make a similar claim with respect to the victim in this case. (E.R. 960–71, 976). Instead, he told police that he observed an altercation involving five people at the Dome Building and that he chased one of the suspects on foot for several blocks. (E.R. 960–71).

He then told three different versions of events indicating that he was, in fact, involved in the murder. He stated that he killed the victim in exchange for $300,000 from a man he had met coincidentally, known only as "Juan," (E.R. 985); that he killed the victim after confronting him in an effort to obtain his (Crouse's) criminal records (E.R. 816); and that he killed the victim during the course of breaking into his car. (E.R. 1028–29). He then recanted those statements, contending that he had not killed the victim (E.R. 820). But then, he recanted that recantation. (E.R. 820, 1079–80).

Crouse then returned to his earlier theme involving payment for killing the victim; this time, however, he stated that he had declined a $10,000 offer from high-ranking prison officials to kill the victim. (E.R. 1113–17). When his claims could not be corroborated, he eventually denied any involvement in the victim's death, acknowledging that his prior statements to police had been false. (E.R. 49). And, as noted earlier, when Crouse was called as a witness during a hearing at petitioner's trial, he testified under oath that he did not commit the crime. (E.R. 760).

Even within Crouse's statements that he committed the murder, the details varied. For example, he first relayed that he had stabbed the victim in the heart in an upward motion (E.R. 813–14, 941), but later stated that he had used a downward motion (E.R. 941, 1029). And he gave varying explanations

for his escape route, claiming that he ran away from the crime scene both to the west and to the east, as well as claiming at times that he had initially run to the east and then ran back to the victim's car, pushing the victim into the car before running to the west. (E.R. 937, 985, 1011, 1030–31, 1231).

In addition to being internally inconsistent, Crouse's statements were inconsistent with physical evidence and other witness testimony. For example, Crouse stated that he stabbed the victim in the stomach, but the victim was not stabbed in the stomach. (E.R. 826, 1012, 1022, 1029). He also claimed to have cut the victim on his arms and his hands, but the victim did not appear to have been cut on his arms or hands. (E.R. 839, 1039). He stated that he had stabbed the victim five times, but the victim was not stabbed five times. (E.R. 839, 1009). Further, Crouse identified the knife that he claimed to have used to stab the victim, but the knife did not share the "general class characteristics" of the murder weapon. (E.R. 827–28, 1001, 1005, 1050; *see also* E.R. 838–39 (defense counsel stipulates to this inconsistency)). And, contrary to Crouse's claim, there was no blood on the sweatshirt he claimed had been bloodied during the murder, nor on any of his other clothing. (E.R. 1045–46; *see also* E.R. 837–39 (defense counsel stipulates to the lack of detectable blood)). In fact, the clothes that Crouse stated he wore during the crime were "totally different" from the clothing described by Hunsaker, the non-recanting

eyewitness who described the assailant without being able to identify him. (E.R. 825).

Although the district court identified aspects of Crouse's statements that it viewed as consistent with physical evidence, it ignored the many ways in which Crouse's statements conflicted with that evidence, discussed above. Regardless, to the extent that Crouse's confessions contained details consistent with the known facts of the murder or any physical evidence, a reasonable juror would not likely find that fact remarkable in this case. Crouse admitted in his initial police interview that he had learned details about the murder from newspaper accounts. (E.R. 43). Given the public stature of the victim, the murder was widely reported in the news, including in an article published within weeks of the murder—and before Crouse's first interview with police in February 1989. (E.R. 194–97; *see also* E.R. 43 (listing date of first Crouse interview)). That article reported the location and approximate time of the murder, that it took place near the victim's car, that the victim died from a stab wound to the heart, that the victim suffered other wounds, that robbery or revenge were possible motives, and that the victim had previously worked in the criminal justice system in other states. (E.R. 195). The article also included

a diagram of the murder scene and the likely path by which the murderer fled. (E.R. 195).[5]

The consistently shifting nature of Crouse's confession—as well as its inconsistencies with other evidence—leaves it too unreliable to undermine the evidence of guilt outlined above, let alone to satisfy *Schlup*'s requirement of "new *reliable* evidence." *Schlup*, 513 U.S. at 324 (emphasis added). Put differently, Crouse's confession was not reliable enough to cause all reasonable jurors to doubt the evidence of guilt outlined above.[6]

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[5] The record suggests that the public availability of those details, combined with the high level of media interest, led others to falsely confess. During petitioner's state post-conviction proceedings, one of his defense investigators stated that he "did an investigation of the eight or ten or so people who had confessed to the crime." (E.R. 321). And the record suggests that Crouse had a tendency for self-aggrandizement that would have made him particularly susceptible to the allure of attention from the media or others. For example, in the course of telling his parole officer his initial story of observing five men murder the victim, Crouse claimed to have "stopped 11 rapes" as a bystander. (E.R. 132). Further, in connection with that same story, Crouse claimed to have continued looking for the man he chased "every day and every night," working even harder and without interest in reward after he learned the victim's identity. (E.R. 978).

[6] Indeed, the jury here did learn that Crouse had confessed to the crime, and that did not prevent them from convicting petitioner. A detective testified at petitioner's trial that Crouse had been a suspect and had confessed to the murder, though the confession could not be corroborated and was ultimately recanted. (E.R. 322–23). Although the jury did not learn further details of the confession, the foregoing analysis establishes that a full exploration of those

Footnote continued…

e. The evidence in this case does not approach the evidence that presented close questions of actual innocence in other cases.

The fundamental flaw in petitioner's case is that his new evidence does not meaningfully or reliably undercut the state's evidence of guilt. Petitioner's new evidence here is not as compelling as the evidence in *House*, the only case where the Supreme Court held *Schlup*'s standard to be satisfied, and where the petitioner offered expert testimony to persuasively establish that the physical evidence at the heart of his conviction—again, the petitioner's semen found on the victim's clothing and the victim's blood found on the petitioner's clothing—did not connect the petitioner to the crime in the way the state had argued at his criminal trial. The Supreme Court repeatedly emphasized that even *House* was a "close" case under the *Schlup* standard. 547 U.S. at 554, 555. If *House* was close, then petitioner's evidence here is not enough to satisfy the *Schlup* standard.

Nor is petitioner's new evidence here as strong as the evidence offered by the petitioner who prevailed in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (*en banc*). The evidence in that case—which this court has since

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(…continued)
details would not have led a reasonable juror to give much more weight to the confession than would be required by the simple fact that it occurred.

accurately described as "dramatic," *see Larsen*, 742 F.3d at 1096—involved an open-court, under-oath confession from the prosecution's "chief" trial witness, who stated that he himself (and not the petitioner) had committed the murder for which the petitioner had been convicted, and that sworn confession "accurately described details about the crime and the crime scene that only a participant could have known." *Carriger*, 132 F.3d at 470–72, 478.

Here, by contrast, Crouse's confession was not made in open court or under oath, and any accuracy in its details reflected information available from public news stories. Indeed, his only sworn statements about the murder *denied* any involvement. (E.R. 74). Further, the recantations here are not as compelling as the one in *Carriger*, where the recantation did not simply retract incrimination of the petitioner but instead took personal responsibility for the crime at issue. Importantly, *Carriger*—like *House*—presented a close case under *Schlup*, as five members of the en banc panel would have reached a contrary conclusion. *See Carriger*, 132 F.3d at 492 (Kozinski, C.J., dissenting). Given the closeness of the result in *Carriger*, the evidence in this case—which is materially weaker in key respects as explained above and below—cannot be sufficient to satisfy *Schlup*'s standard.

Indeed, unlike the recantations in *Carriger*, the affidavits of the recanting witnesses here amounted to little more than a refutation of previous statements

incriminating petitioner. As such, those recantations are no different from impeachment evidence. Yet the jury convicted petitioner even after being given ample reason at trial to distrust the testimony of the witnesses who have since recanted. That is, the jury likely did not believe everything those witnesses said, but rather credited only those parts of their testimony that petitioner himself corroborated.

For example, at petitioner's trial, Swearingen adamantly insisted that she had lied under oath during the grand jury proceedings. (*See, e.g.*, E.R. 750). And on cross-examination, Harden admitted that many of his statements to the police regarding the investigation were lies and that he had written a letter to his nephew stating that police were offering him "freedom and cash" to testify against petitioner, whom Harden believed was a "rat." (*See, e.g.*, E.R. 610–16, 627–29). The jury also heard from several witnesses who testified that Harden had admitted to lying in exchange for benefits, reward money, or because of police conduct. (E.R. 637–43, 649–51, 659–61, 671–73, 676–80, 688–90, 699–701). As to Childers, the jury was aware that he had made inconsistent statements to police and had ultimately received benefits for his testimony against petitioner. (E.R. 507–12, 520, 528–29, 536). And, of course, the jury heard that the witnesses were drug users or dealers and that many had an extensive criminal history. (E.R. 516–18 (Childers); E.R. Tr 544, 551, 561–62

(Harden); E.R. 726–27 (Swearingen)).

In those circumstances, further impeachment evidence is not sufficient to satisfy *Schlup*, at least when (as here) the conviction rests on evidence apart from the testimony of impeached witnesses. *See Calderon v. Thompson*, 523 U.S. 538, 559–66, 118 S. Ct. 1489 (1998) ("Given the trial evidence impeaching each informant, we would disrespect the jury in [the criminal] case if we were to find that, had it been presented with still more impeachment evidence, it would have reached a different verdict.").

B. The state trial court did not violate petitioner's due-process rights by excluding hearsay evidence of Crouse's recanted confession.

In any event, even if petitioner's claim of trial-court error is reviewable notwithstanding petitioner's procedural default, it fails on the merits. At issue is the state trial court's ruling that Crouse's recanted confessions were inadmissible hearsay and that, because the declarant was available as a witness, petitioner could not admit them as substantive evidence under Oregon's statement-against-interest hearsay exception. (*See* E.R. 74–75).

The starting point for the trial court's hearsay analysis was Oregon Evidence Code Rule 802, which provides that hearsay is inadmissible unless a specific exception applies. One such exception is found in Rule 804(3)(c), which applies when "the declarant is unavailable as a witness" and a party offers evidence of:

> *[a] statement which was at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or *so far tended to subject the declarant to civil or criminal liability,* or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement*.

(Emphases added). The district court concluded that the state court's application of those hearsay rules denied petitioner his due-process right to present a defense under *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973). (E.R. 81–88 (discussing "the trial court's application of state hearsay rules")). But as explained below, the trial court's ruling did not amount to a due-process violation under *Chambers*.

Under *Chambers*, the Supreme Court recognized "a defendant's right to present a defense," rooted in "the right to due process provided by the Fourteenth Amendment." *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009) (citing *Chambers*, 410 U.S. at 294). In its most simple formulation, the core holding of *Chambers* was that a "hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302; *see also LaGrand v. Stewart*, 133 F.3d 1253, 1266 (9th Cir. 1998) (surveying *Chambers* and related cases to explain that, "taken together," those cases "stand for the proposition that states may not impede a defendant's right to put on a defense

by imposing mechanistic * * * or arbitrary * * * rules of evidence").[7]

But this court has long recognized that the holding of *Chambers* was narrow and did not change the standard rule that a "'defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions,' such as evidentiary and procedural rules." *Moses*, 555 F.3d at 757. Thus, where an evidentiary rule is reasonable rather than arbitrary, *Chambers* cannot be used to create an exception to that rule no matter how trustworthy a defendant's inadmissible evidence might be.

Put simply, *Chambers* does not apply to all evidentiary rules. *Cf. Moses*, 555 F.3d at 758 (suggesting that Washington's Rule 702 was simply not subject to a *Chambers* challenge); *see also LaGrand*, 133 F.3d at 1267 (describing *Chambers* and other cases as creating a "prohibition against *arbitrary and mechanistic exclusion* of exculpatory evidence" or against "excluding exculpatory evidence *by application of rigid or arbitrary exclusionary rules*" (emphases added)). Otherwise, federal due-process law would permit criminal defendants to challenge any and all evidentiary rules, subject to review in

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[7] In addition to *Chambers*, *LaGrand* discussed *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150 (1979), *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967), and *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704 (1987).

federal courts, depriving states of their ability to maintain orderly and consistent administration of justice in their own courts. Both this court and the Supreme Court have consistently rejected any such view of due process. *See LaGrand v. Stewart*, 133 F.3d 1253, 1266 (9th Cir. 1998) (explaining that *Chambers* and related cases "do not stand for the proposition that a defendant must be allowed to put on any evidence he chooses"); *see also Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142 (1986) ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see the evidence admitted.").

In summary, then, the first step of the *Chambers* analysis requires determining whether the challenged evidentiary ruling involves an arbitrary rule or instead a reasonable restriction on evidence, because *Chambers* applies only to the former. And the second step of the analysis requires asking, if the ruling was premised on an arbitrary rule, whether its application to exclude evidence was contrary to the ends of justice. Petitioner's claim here fails at both steps of the analysis.

1. The state trial court's evidentiary ruling turned on the application of a reasonable, rather than arbitrary, rule.

In assessing whether particular state rules of evidence are reasonable, the core inquiry should be whether they "'are arbitrary or disproportionate to the

purposes they are designed to serve.'" *Moses*, 555 F.3d at 757 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727 (2006)). That is, a rule is arbitrary rather than reasonable only if operates with "little or no rational justification." *Moses*, 555 F.3d at 758.

For example, *Chambers* itself involved a challenge to an evidentiary ruling predicated on "a Mississippi common-law rule that a party may not impeach his own witness." 410 U.S. at 295. That rule was arbitrary rather than reasonable because it was a "remnant of primitive English trial practice" that bore "little present relationship to the realities of the criminal process." *Id*. at 296. As a rule that continued solely as an artifact of ancient practice and that had been rejected by the drafters of the Federal Rules of Evidence after being "condemned as archaic, irrational, and potentially destructive of the truth-gathering process," that rule served no legitimate purpose and could easily be described as arbitrary and mechanistic. *See id*. at 296 nn.8–9.

Similarly, in *Green v. Georgia*, 442 U.S. 95, 96 & n.1, 99 S. Ct. 2150 (1979), the Court ruled in favor of the proponent of hearsay under a framework where hearsay was generally excluded subject to an exception available for statements against pecuniary interest but not for statements against penal interest. But by the time *Green* was decided, many commentators saw little logical reason to differentiate between pecuniary interests and penal interests,

and the Federal Rules of Evidence had abandoned that distinction. *See* Fed. R. Evid. 804 advisory committee's note (1972) (explaining that the "refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic" and that "an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake"). And that distinction was particularly indefensible when the state had used the very same hearsay—which was a third-party declarant's confession to the crime—against the declarant when seeking the death penalty in his case, under a different evidentiary rule allowing a criminal confession to be admitted against a declarant. *Green*, 442 U.S. at 97 n.3. Thus, the rule at issue in *Green* was also arbitrary and mechanistic. *See also Washington v. Texas*, 388 U.S. 14, 16–17, 22–23, 87 S. Ct. 1920 (1967) (concluding that an evidentiary rule was similarly arbitrary, explaining that the rule prevented persons charged or convicted as co-participants in the same crime from testifying for one another but allowed such testimony when offered by the state, without any legitimate purpose for such a one-sided rule).

The analysis in *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704 (1987), was only somewhat different—turning less on the challenged rule's lack of any legitimate purpose and more on the disproportionate relationship its effect bore to its purpose. The challenged ruling in that case prevented the petitioner from

presenting his own "hypnotically refreshed testimony," which had the effect of limiting his own testimony about the events of the charged crime. *Id*. at 46–48. Explaining that due process requires asking "whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify," the Court ultimately concluded that a *per se*, exceptionless rule of exclusion was disproportionate because a state's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Id*. at 56–61. That is, no matter how reliable the evidence might have been, it would not have been admitted under the state's rule.

In contrast to those cases, due process does not prohibit the use of "well-established rules of evidence" such as those that "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326. The hearsay rules that the trial court relied upon in this case were likewise well established—indeed, they were materially identical to parallel federal evidentiary rules. *See* Fed. R. Evid. 804(b)(3).

As well-established rules of evidence, the hearsay rules at issue here served a legitimate purpose and were not disproportionate to that purpose. Again, the trial court ruled that petitioner could not rely on the statement-against-penal-interest rule to admit Crouse's recanted out-of-court confession

because Crouse was available. (E.R. 75). The unavailability requirement to that hearsay exception is neither pointless nor arbitrary. As the commentary to Oregon's Rule 804 explains, the exceptions in that rule do not, unlike the exceptions in Rule 803, establish circumstances that render an out-of-court statement equal in quality to in-court testimony. Or. Evid. Code R. 804 conference committee commentary.[8] Rather, Rule 804 "is based on a different theory: that hearsay which is admittedly *not* equal in quality to testimony of the declarant on the stand may nevertheless be admitted, if the declarant is unavailable and if the statement meets a specified standard." *Id*. (emphasis in original). That rule reflects a series of preferences: "testimony given on the stand is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant." *Id*.

Here, Crouse testified under oath that he did not kill the victim. (E.R. 74). That in-court testimony is reasonably treated as more reliable than a series of unsworn out-of-court statements, and where available, it provides a rational basis for excluding out-of-court statements on the same topic. *Chambers* does not hold that a criminal defendant has a right to override that legitimate and

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[8] The conference committee commentary is available on Westlaw, appended to the text of the pertinent rule.

rational evidentiary preference, and it does not allow a criminal defendant to override general hearsay rules whenever he can produce an out-of-court confession by a third party. Importantly, unlike in *Washington* and *Green*, the rule is not one-sided—the record does not reflect that the state has ever used Crouse's confession as substantive evidence in a criminal trial.

Nor is Oregon's Rule 804 disproportionate to the purpose it serves. Put simply, Rule 804—unlike the rules at issue in *Chambers*, *Green*, and *Washington*—bears a valid relationship to the fact-finder's search for truth. And unlike the rule in *Rock*, the rule does not amount to a *per se* exclusion. Rather, it remains subject to the residual hearsay exception found in Oregon's Rule 803(28)(a). That exception applies to:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:
>
> (A) The statement is relevant;
>
> (B) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and
>
> (C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

Or. Evid. Code R. 803(28)(a). Importantly, that rule applies without regard to whether the declarant is available at trial, and it was included in the original

1981 enactment of Oregon's evidentiary code, well before trial in this case. *See* 1981 Or. Laws ch. 892, § 64.

The availability of that residual exception—which explicitly contemplates the "interests of justice"—is precisely the kind of case-specific safety valve that the Court concluded was necessary and lacking in *Rock*. *See* 483 U.S. at 61 ("The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified.").[9]

Finally, the foregoing analysis is not contrary to decisions in which this court has concluded that a *Chambers* violation resulted from the exclusion of evidence under other states' statement-against-penal-interest hearsay

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[9] To be clear, the state does not argue that Crouse's recanted confessions would have been admissible under the residual exception. For reasons set forth below, those recanted confessions do not bear sufficient indicia of reliability or guarantees of trustworthiness. Thus, they would not have been admissible under the residual hearsay exception and petitioner cannot successfully argue that post-conviction counsel should have raised a claim attacking his trial counsel's failure to argue the residual exception. But regardless whether those confessions would have been admissible under the residual exception, the existence of that exception undermines any contention of arbitrariness or disproportionality in the statement-against-interest hearsay exception or its availability requirement.

exceptions. (*See* E.R. 79–82 (discussing *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012), and *Lunbery v. Hornbeak*, 605 F.3d 754 (9th Cir. 2010)). Neither *Cudjo* nor *Lunbery* considered whether the unavailability aspect of a statement-against-interest rule was violative of due process; indeed, in both those cases, the declarant at issue was undisputedly unavailable. *See Cudjo*, 698 F.3d at 758; *Lunbery*, 605 F.3d at 759. That is, *Cudjo* and *Lunbery* involved the exclusion of potentially exculpatory evidence when no more reliable substitute was available; in this case, by contrast, the excluded evidence was contrary to available sworn testimony from the declarant, and that sworn testimony was necessarily more reliable than the hearsay, which was therefore excluded under reasonable state evidentiary rules. Indeed, in *Cudjo*—unlike in this case—a state court had ultimately concluded that the excluded evidence should have been admitted under state evidentiary rules. 698 F.3d at 758–59.

For all those reasons, the trial court's evidentiary ruling in this case does not rest on the kind of rule that *Chambers* contemplated as subject to a due-process challenge. On that basis alone, petitioner's claim of trial-court error is without merit.

2. Excluding Crouse's recanted confession was not contrary to the ends of justice.

In the alternative, even if the evidentiary ruling in this case is susceptible to a *Chambers* challenge, Crouse's recanted confession was not reliable enough

that excluding it was contrary to the ends of justice. To succeed on a *Chambers* claim, a petitioner must present evidence that was excluded in "'unusually compelling circumstances'" of the sort that can "'outweigh the strong state interest in administration of its trials.'" *Moses*, 555 F.3d at 757 (quoting *Perry v. Rushen*, 713 F.2d 1447, 1452 (9th Cir. 1983)).

Crouse's recanted confessions here were not unusually compelling. First, as set forth above, they were internally inconsistent and contrary to physical evidence.

Moreover, unlike in *Chambers*, petitioner here offers no eyewitness testimony identifying his third-party confessor as the murderer, nor was Crouse's confession sworn under oath like the confession in *Chambers*. *See* 410 U.S. at 300; *see also Christian v. Frank*, 595 F.3d 1076, 1083 (9th Cir. 2010) (distinguishing *Chambers* on that basis before denying relief on a similar claim). Indeed, the available evidence from eyewitnesses pointed toward petitioner, not Crouse, as the murderer. Specifically, Swearingen and Harden—whose recanted statements were corroborated by petitioner's own behavior as discussed above—identified petitioner as the murderer. And the clothes that Crouse stated he wore during the crime were "totally different" from the clothing described by Hunsaker, who has never recanted his testimony as to what he witnessed and in which he described the assailant without being able to

identify him. (E.R. 825). Nor could Crouse be tied to the murder weapon like the third-party confessor in *Chambers*. *See* 410 U.S. at 300. To the contrary, Crouse identified the knife he claimed to have used to stab the victim, but the knife did not share the "general class characteristics" of the murder weapon. (E.R. 827–28).

In light of all those problems, Crouse's confession was not compelling enough to meet the high threshold of reliability that *Chambers* requires. And those problems similarly show that Crouse's confession is not as reliable as the ones that this court held to be reliable in *Lunbery* and *Cudjo*. For example, in *Lunbery*, the third-party confession was "completely consistent" with the murder evidence, unlike Crouse's confession here. 605 F.3d at 761 n.3. And in *Cudjo*, the state supreme court had concluded that the third-party confession was "probably true." 698 F.3d at 762. The record in this case contains no similar state-court finding.

C. Petitioner is entitled to no relief on his claim that his trial counsel provided ineffective assistance by not raising a due-process objection to the exclusion of Crouse's recanted confession.

Petitioner's ineffective-assistance claim must be assessed under the familiar standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). "In order to establish ineffective assistance under *Strickland*, a petitioner must show both deficient performance and prejudice." *Hibbler v.*

Benedetti, 693 F.3d 1140, 1149 (9th Cir. 2012), *cert. den.*, 133 S. Ct. 1262 (2013) (internal quotation marks omitted). That standard requires courts to be "highly deferential" in reviewing trial counsel's performance for deficiency. *Cheney v. Washington*, 614 F.3d 987, 994 (9th Cir. 2010).

But deference to trial counsel is not the only deference due in this case. Because petitioner's claim is procedurally defaulted, this court may not consider it absent a showing of both cause and prejudice. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546 (1991) (holding that a prisoner may obtain federal review of a procedurally defaulted claim by showing cause and prejudice). And because petitioner seeks to establish cause and prejudice under *Martinez*, his claim requires applying *Strickland*'s deferential standard twice, to two different layers of representation. To show cause under *Martinez* requires showing that petitioner "was not represented or had ineffective counsel during the PCR proceeding." *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (*en banc*). That requirement reduces to the question whether post-conviction counsel was ineffective under both prongs of *Strickland*. *Clabourne v. Ryan*, 745 F.3d 362, 376–78 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015).

That second layer of *Strickland* deference—applicable to post-conviction counsel in addition to underlying trial counsel—results in double deference

notwithstanding the fact that, because petitioner's defaulted claim was not presented to the state post-conviction court, "there is no state court decision on this issue to which to accord deference" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *see also Dickens*, 740 F.3d at 1321 (explaining that AEDPA does not apply to procedurally defaulted claims and that, upon showing of cause and prejudice to excuse that procedural default, a federal court may review such claims de novo).

In short, the standard remains doubly deferential even though AEDPA is inapplicable: this court owes one layer of deference under *Strickland* to trial counsel's tactical choices, and then a second layer of deference under *Strickland* to post-conviction counsel's tactical choices. Although that analysis is different than AEDPA double deference—in which the second layer of deference comes from AEDPA rather than from applying *Strickland* to counsel at a different proceeding, *see generally Hibbler*, 693 F.3d at 1150—it reduces to a similar inquiry. Under AEDPA double deference, the inquiry is "not whether counsel's actions were reasonable but whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Hibbler*, 693 F.3d at 1150 (internal quotation marks omitted). Under *Martinez*, the inquiry is similar: not whether trial counsel's actions were reasonable, but whether any

post-conviction counsel would see any reasonable basis for omitting a claim against trial counsel.

Here, the claim against trial counsel fails even if it could be reviewed with a single layer of *Strickland* deference to trial counsel's choices. But regardless, that claim fails even more clearly when viewed through the second layer of deference owed to post-conviction counsel.

The key to analyzing all those questions is that a *Chambers* claim was not likely to succeed, for all the reasons set forth above. For that reason, petitioner's claim fails on *Strickland*'s prejudice requirement. But at a minimum, the question was close, such that trial counsel could have reasonably concluded that it would have failed, and this court should presume and defer to trial counsel's judgment on that question. Moreover, even if this court is unconvinced that trial counsel performed reasonably, the question is close enough that post-conviction counsel might reasonably have concluded that a *Strickland* claim against trial counsel on such grounds was unlikely to succeed and thus could have reasonably chosen to pursue alternative claims that had a greater chance of success—including, but not limited to, a claim that counsel failed to develop and present evidence showing that someone else committed the murder. (*See* E.R. 41; *see also* E.R. 1378–84 (state post-conviction petition)).

At bottom, petitioner's *Chambers* argument is not so indisputably meritorious that this court can say that all reasonable post-conviction counsel would have been confident that a state post-conviction court could be convinced that all reasonable trial counsel would have raised the issue at trial.

In the alternative, even if this court concludes that petitioner's *Chambers* claim would be meritorious under *Cudjo* and *Lunbery* (decided in 2012 and 2010, respectively), not all reasonable trial counsel would have recognized as much at the time of petitioner's 1991 trial, and not all reasonable post-conviction counsel would have recognized as much at the time of petitioner's 2000 post-conviction proceedings. (*See* E.R. 7, 41 (showing relevant dates)). This court decided *Cudjo* and *Lunbery* well after those proceedings were complete, and until those decisions were announced, most reasonable counsel would have taken the Supreme Court at its word that "*Chambers* was an exercise in highly case-specific error correction," limited to the facts of that case and not readily extensible to other situations. *Montana v. Egelhoff*, 518 U.S. 37, 52–53, 116 S. Ct 2013 (1996); *see also Fortini v. Murphy*, 257 F.3d 39, 48 (1st Cir. 2001) ("It is very difficult to predict the evolution of *Chambers* because in over 30 years it has been used by the Supreme Court only a handful of times to overturn convictions; and the Supreme Court's standards are quite vague, although understandably so in a due process matter.").

In short, petitioner's *Chambers* claim is not the sort of exceptional claim that *Martinez* contemplated as eligible for relief from procedural default.

CONCLUSION

The district court's judgment should be reversed, and this case should be remanded with instructions to enter judgment denying relief on all of petitioner's habeas claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellant's Brief is proportionately spaced, has a typeface of 14 points or more and contains 13,484 words.

DATED: August 12, 2019

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK E. GABLE, Petitioner-Appellee, v. MAX WILLIAMS, Respondent-Appellant.	U.S.C.A. No. 19-35427 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellant, certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2019, I directed the Appellant's Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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